In the Supreme Court of the United States

OCTOBER TERM, 1956

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

v.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, AS TRUSTEE UNDER INDENTURE DATED THE 21ST DAY OF MARCH, 1928, BETWEEN CHARLES L. COBB AND THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

REPLY BRIEF FOR THE PETITIONER

The briefs for the respondents seem to suggest that in the previous suit in which the judgment of January 30, 1948 (R. 211–224) was entered, the Attorney General, as successor to the Alien Property Custodian, put in issue and litigated his right to *res* vest the corpus of the trust, and that the New York courts determined that he had no such right.

In the brief for the respondent Bank is this statement, supported by no reference to the record:

> In the Court of Appeals the Attorney General, referring in his brief to the broad powers

> given to the Attorney General under the Trading with the Enemy Act to seize property, demanded in the alternative that the Court of Appeals determine that the entire trust fund should be paid over to him. [p. 4]

The brief for the respondent Arthur J. O'Leary, *et al.*, states:

> Petitioner in the prior proceeding relating to this trust made a "turnover" demand [1] which the New York Court of Appeals ruled upon and held invalid (R. 197). [p. 18]

And the brief for the respondents Hans Dietrich Schaefer, *et al.* states:

> In the prior action, in which Custodian's request that he was entitled to immediate possession of the trust was denied * * * [p. 7]

These statements would appear to imply that in the prior action the right of the Attorney General to vest the *res* was litigated and determined adversely to him, and he did not apply for certiorari, so he is estopped from asserting the same right in the present action. Cf. *Angel* v. *Bullington*, 330 U. S. 183.

Such implication, however, is erroneous, and the question of estoppel is not presented, because the statements quoted above reflect a misreading of the record.

In the first place, the 1948 judgment, printed in full in the record at pages 211 to 224, contains no reference to a claim by the Attorney General for

[1] In *Zittman* v. *McGrath*, 341 U. S. 471, the Attorney General issued a "turnover directive" subsequent to a "right, title, and interest" vesting order.

principal or to the denial of such a claim. And the finding of the trial court that:

> It was also requested in said action by the Attorney General as Successor to the Alien Property Custodian that the Court should determine that the entire principal of the said trust should be transferred to the Attorney General as Successor to the Alien Property Custodian on the ground that all interests in the trust had vested in the Attorney General by said vesting order #4551 [R. 155–160]

refers, as pointed out in our main brief (p. 21), to a claim based on the vesting of *interests*. It had nothing to do with any claim of a *res* vesting or of a right to immediate possession.

Page 197 of the Transcript of Record in the present suit shows that at the trial counsel for the respondent Bank offered in evidence the Attorney General's brief in the New York Court of Appeals in the first suit "to show the extent of the litigation and the effect of the Judgment which was affirmed by the Court of Appeals".

That brief was not received in evidence (R. 198–199) and is not in the printed record, which was stipulated by the parties as containing "all the evidence" (R. 340). We have, however, for the convenience of the Court, and to clarify the matter, lodged with the Clerk one original printed copy of that brief and eight photostatic copies.

What that brief discloses is that in the Court of Appeals the Attorney General stated that under the Act he *could* have vested the true *res* (pp. 10, 13–14),

but that he had not done so. There was an argument on pages 26 to 29, inclusive, under the heading:

> IV. If the Powers Reserved to Bruno Reinicke, Jr., Cannot Be Exercised by the Custodian as Reinicke's Successor, the Trust Should be Terminated.

The gist of the argument was that by the "right, title, and interest" vesting the Attorney General had succeeded to Reinicke's right of reversion (R. 237), that if Reinicke could no longer exercise his "personal" powers over the trust (and the judgment was that he could not, R. 221), then, under New York law, the trust should be terminated for failure of its purposes, and in that event the Attorney General would be entitled to the property as Reinicke's successor in interest. The argument was based on the vesting of one of Reinicke's "interests", the right of reversion, and asserted only his rights; there was no assertion of a *res* vesting, no "turnover demand", and no claim of a right to immediate possession.

In short, in the prior action the right or authority of the Attorney General was not asserted as a claim, it was not litigated, and it was not determined by the Court of Appeals of the State of New York or by any other court.

Respectfully submitted.

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